Supreme Court, U.S.
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No. 97-508

In The

Supreme Court of the United States

October Term, 1997

DOUG MOCKETT & COMPANY, INC.,

Petitioner,

vs.

ROGER PLUMLEY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ABSENCE OF JURISDICTION

This is a state law unfair competition and trade secret misappropriation dispute over who invented a new kind of plastic grommet. The unpublished decision below, from California's intermediate Court of Appeals, was based on issues of state law procedure and waiver. It involved how a court should proceed on exclusively state law claims when both legal and equitable claims are pleaded and tried concurrently. Here the Petitioner (Mockett) agreed to the procedure the trial court employed so there is the additional issue of Mockett having waived any objection. All of the state court litigation was focused on the state law issues of:

- Whether, under the California Constitution (Cal. Const., art. 1, sec. 16) the trial court improperly foreclosed Mockett's right to jury trial on the legal issues of liability by also making findings on the equitable issues that resolved Mockett's legal claims; and

- Whether Mockett could complain since "he invited the order of proof adopted by the trial court, and accepted the risk that the trial court might render dispositive findings in the event of a jury mistrial." (Pet., App. A, p. 15)

Below, Mockett urged that when legal and equitable claims are, by mutual agreement, tried concurrently to a jury and a court respectively, and the jury deadlocks on the legal claims, the court may not decide the equitable claims adverse to Mockett but must instead defer the equitable claims and order a new trial on the legal claims. He claimed that, under California law, where the "gist" of

the case is legal, the trial court may not decide equitable claims concurrently presented to it. Respondent (Plumley) countered that, under California law, where the plaintiff pleaded distinct legal and equitable claims and agreed to have them tried concurrently there is no deprivation of a jury trial if the court separately decides the equitable claims even though a jury deadlocks on the legal claims. Moreover, if resolution of the equitable claims and legal claims turned on the same facts, as Mockett agreed was the case here, then resolution of the equitable claims would also dispose of the legal claims as no factual issues remained to be decided.

The three-judge California Court of Appeal unanimously held that well-settled rules of state procedure permit exactly what occurred and do not deprive Mockett of a right to jury trial under the California Constitution. (Pet., App. A, pp. 8-15) It also determined that Mockett waived any objection to the process by "inviting the order of proof adopted by the trial court." (Pet., App. A, p. 15) The appellate court therefore upheld specific findings by the trial court that Mockett lied about inventing the grommet, that Mockett forged documents to support his claim, that Mockett knowingly brought this case in bad faith, and that Mockett had no legal damages in any event. (Pet., App. A, pp. 6, 16-17) All as a matter of California law. All without any party raising any issues of federal law. All without any party even citing any provision of the United States Constitution. The California Supreme Court declined to exercise its discretionary review of the Court of Appeal decision.

The Seventh Amendment, which Mockett uses as his jurisdictional entree, played absolutely no part in this case.

- A substantial federal question was neither raised, presented nor pursued in the state court proceedings.
- The decision below was alternatively based on the separate, adequate and independent ground that Mockett "invited the order of proof" and waived any objection.

It would thus appear that this Court has no jurisdiction to review the state court determinations of state law issues. *Henry v. Mississippi*, 379 U.S. 443, 446 (1965). We have included a more extended jurisdiction discussion *infra*.

STATEMENT OF THE CASE

The facts of this case are well set forth in the decision of the California Court of Appeal attached as Appendix A to the Petition.

REASONS FOR DENIAL OF THE PETITION

I

This Court's Jurisdiction Is Properly Reserved For Cases Raising Significant Federal Questions

There are good reasons why this Court abjures cases based on state law. One of them is jurisdictional: this Court does not sit as a court of error to review state court

decisions of state law. Another reason recognizes that when federal questions are not raised in the state court the record is very likely to be inadequate since it was not compiled with a federal question in mind. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). And finally, even if a federal question is raised below, review by this Court is unnecessary if the state court decision is supported by an adequate and independent state ground. *Id.* For the jurisdiction of the Supreme Court to be invoked under 28 U.S.C. § 1257, it is essential that a substantial federal question be raised, presented, and pursued in a timely and proper manner in the state court proceedings. *Beck v. Washington*, 369 U.S. 541, 550-554 (1962). A federal claim must *either* be raised in the state court *or* considered and resolved by the state court, before it can be considered by this Court. *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940); *Hill v. California*, 401 U.S. 797, 805 (1971).

A

Federal Constitutional Provisions Were Neither Raised, Briefed Nor Discussed By The California Courts Or Petitioner

The party seeking certiorari has the burden to demonstrate this Court's jurisdiction. *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 651 (1942). The petition must specify when the federal question was first raised, the manner in which it was raised, and the decision made by the state court as to the federal question, along with supporting citations to the record. *Supreme Court Rules*, Rule 14.1(g)(I) (1995 Revised). Mockett has not done that.

First, no constitutional issue was decided below. The opinion of the California Court of Appeal does not even mention the United States Constitution or any federal law. The decision deals exclusively with state law. (Pet., App A)

Second, no federal issue was raised below. When the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in the Supreme Court can affirmatively show the contrary. *Street v. New York*, 394 U.S. 576, 582 (1969).

The Petition's reliance on the Seventh Amendment marks the first mention of that provision in the appellate briefing of this case. Attached as Appendices 1 through 4 are the tables of authorities from the briefs filed by Mockett in the California appellate courts, including the Petition for Rehearing in the Court of Appeal and the Petition for Review to the California Supreme Court (where, at the very least, one would have expected the supposed Seventh Amendment issue to have been raised). Instead, Mockett's arguments at all stages have been targeted wholly on state law procedural issues.

Even in his Statement of the Case to this Court, Mockett makes only one reference to any federal law raised below, stating:

> "[i]n the pleadings filed in the trial court, Petitioner claimed the right to jury trial on his legal causes of action both under the California and United States Constitution. (JA 992-997, 1565-66)" (Pet., p. 5)

But in the first of these two references to the record, there is no discussion or citation of the United States Constitution or any federal law. JA 992-997. And while pages JA 1565-66 do cite two federal cases, *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) and *Dairy Queen Inc. v. Wood*, 369 U.S. 469 (1962), there is no reference to the Seventh Amendment. Moreover, the reference to those two cases was part of an ancillary pleading Mockett filed in the trial court in opposition to Plumey's post-judgment Motion for Attorneys' Fees. Mockett was there arguing, by analogy, the hypothetical implications of the trial court's decision if applied to federal anti-trust law. He was not asserting that the Seventh Amendment or any federal law guaranteed him an absolute right to jury trial. Mockett did not repeat this argument in any of the appellate proceedings. The mere reference by analogy to federal law in opposition to an attorneys' fees application below does not create a substantial federal question or confer upon this Court jurisdiction over state law issues.

The Petition is too late to raise the necessary federal question for jurisdiction. *Heath v. Alabama*, 474 U.S. 82, 87 (1985). It is the state court record that must affirmatively show that the Petitioner raised the federal issue. And the Petition is not part of the state court record, and thus it cannot be relied upon to confer the requisite jurisdiction. *White River Lumber Co. v. Arkansas ex rel. Applegate*, 279 U.S. 692, 700 (1929).

California law was the beginning and the end of Mockett's arguments below. And that should be the end of this case.

B

Mockett's Waiver Created An Independent Ground For Affirmance

When a state court decides a case solely on either a state law issue or an alternative state law issue, this Court has no jurisdiction to review that decision as long as the state law determination is adequate and independent of the federal issue. *Broad R.P. Co. v. South Carolina ex rel. Daniel*, 281 U.S. 537, 540-41 (1930); *Michigan v. Long*, 463 U.S. 1032, 1037 (1983).

Here the nonfederal grounds are not merely the "adequate and independent" thing, they are the only thing. But even if we assume, *arguendo*, that the Seventh Amendment issue was raised and considered in the state court proceedings, the Court of Appeal decision clearly and expressly states a bona fide and independent state ground for affirming the trial court. Where that is true, this Court "will not undertake to review the decision." *Id.* at 1041.

In reaching its decision, the state appellate court found that, irrespective of any right to a jury trial Mockett may have had, he agreed to the procedure adopted by the trial court:

> "[Mockett's] counsel conceded that the trial court should hear the statutory unfair competition claim, prompted the court to order a simultaneous trial of the equitable and legal claims by requesting advisory findings from the jury on the equitable issues, did not object to the simultaneous trial as ordered, and did not request leave to dismiss the equitable claims when the trial court indicated its intent to rule despite the

> jury mistrial. Appellant thus invited the order of proof adopted by the trial court, and accepted the risk that the trial court might render dispositive findings in the event of a jury mistrial." (Pet., App. A, p. 15)

The state court's finding of waiver does not rest on any federal law and it is an independent ground for the state court's decision.

II

There Is No Reason to Upset This Court's Prior Rulings

Even putting aside these insurmountable jurisdictional defects, another reason for denying the Petition is that it asks the Court to overturn decades of precedent with no justification. Whether the Seventh Amendment right to a jury trial should be applied to the states through the Fourteenth Amendment has been decided by this Court, and the Petition concedes as much. (Pet., p. 6) "[I]t steadily has been ruled that the commandments of the Sixth and Seventh Amendments, which require jury trial in criminal and certain civil cases, are *not picked up by the due process clause of the Fourteenth Amendment so as to become limitations on the states.*" *Fay v. New York*, 332 U.S. 261, 288 (1946) (emphasis added); *see also Curtis v. Loether*, 415 U.S. 189, 192 n. 6 (1974) ("The Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment.").

In fact, this Court has held that the right to a jury trial "may be modified by a state or abolished altogether." *Palko v. Connecticut*, 302 U.S. 319, 324 (1937). The

Court has long been consistent and unwavering in its position on this issue.

The Petition does not bring to this Court any reasons to change the rule. It asserts that recent decisions by this Court evidence a "reinvigoration" of the Seventh Amendment's right to a jury trial. But none of the decisions discussed has anything to do with application of this right to the states.

Two of the cases involve classification of a claim brought to enforce a federal statute as either arising in law or equity. *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989); *Tull v. United States*, 481 U.S. 412 (1987). In both *Granfinanciera* and *Tull*, the lower courts held that actions to recover fraudulent conveyances in a bankruptcy proceeding and to impose civil penalties under the Clean Water Act were equitable in nature, and thus there was no right to jury trial. The Supreme Court reversed, finding that these actions were analogous to 18th-century actions within the jurisdiction of the English law courts. Petitioners, therefore, had a right to a jury trial under the Seventh Amendment. In *Lytle v. Household Manufacturing*, 494 U.S. 545 (1990), the Court held that the petitioner's claim under which he was entitled to a jury trial had been erroneously dismissed by the trial court, and the court's findings as to the equitable claims did not collaterally estop the petitioner from trying his legal claims to a jury.

Nowhere in these cases does the Court address application of the Seventh Amendment to the states. Nowhere is there discussion of anything but federal rights under federal law in the federal courts. Nor is there even an

inkling that the Court wants to reconsider its early decisions and impose upon the states the federal right to a jury trial by incorporating the Seventh Amendment into the due process clause of the Fourteenth Amendment.

The law on this issue is clear. Deprivation of a jury trial on Mockett's legal claims in the state court does not give rise to a violation of due process under the Fourteenth Amendment. There is no issue remaining to be decided by this Court. Period.

CONCLUSION

The issues in this case do not even begin to give rise to a federal, much less a constitutional question. The issues presented and considered below present only state law issues. The Seventh Amendment question Mockett now seeks to open (but has not preserved) has been well-settled for decades and nothing this Court has written demonstrates an inclination or need to upset that precedent.

In the end, Mockett quarrels with the California Court of Appeal's construction of California law. That is a California matter. With respect, it is not the sort of thing

with which this Court needs to concern itself or for which this Court's jurisdiction was created.

Respondent prays that the Petition be denied.

Dated: October 21, 1997

Respectfully Submitted,

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APPENDIX 1
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